

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

ABRANTES CONSTRUCTION CORP.

CASE NO. 91-00058

Debtor

Chapter 11

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APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

The Court considers once again the motion of Northland Associates, Inc.

("Northland") to lift the automatic stay to allow it to proceed in another forum to seek a determination as to its rights as against Abrantes Construction Corporation ("Debtor") and the Internal Revenue Service ("IRS") to certain funds retained by the United States Army Corps of Engineers ("Corps.")

This Court previously issued its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order on April 3, 1991 ("April 3, 1991 Decision"). Thereafter, the IRS filed a notice of appeal from that Order and on October 17, 1991 the District Court ordered a remand of the contested matter to this Court. (See Memorandum-Decision and Order, Neal P. McCurn, C.J. dated October 17, 1991) ("October 17, 1991 Decision").

On remand, the District Court directed this Court "to consider, with specificity, Northland's arguments for "cause" in light of the Curtis factors, and then, only if such cause is shown, to require Abrantes to demonstrate that it is entitled to continued protection. As a first step, the Bankruptcy Court must balance the hardships to the parties before granting Northland's Motion." Id. at page 13. On November 19, 1991, the Court heard further oral argument at the request of the IRS.

### DISCUSSION

Following careful consideration of the Memorandum-Decision and Order of the District Court dated October 17, 1991, this Court does not believe that the decision of the Second Circuit in In re Sonnax, Inc., 907 F.2d 1280 (2d Cir. 1990), which applied the so-called "Curtis factors" is controlling in this contested matter.

The issue before this Court on Northland's motion, and that which it believed it

disposed of, was whether or not the funds held by the Corps "are wholly property of the estate pursuant to Code §541, i.e. whether Northland has an interest in the funds distinct from that of any unsecured creditor of the estate." (April 3, 1991 Decision at pg. 6).

This Court concludes "that Northland, as an alleged subcontractor of the Debtor, has an equitable interest in the funds held by the Corp sufficient to provide the basis of a claim upon which the relief it seeks in another forum may be granted. Accordingly, to the extent Northland possesses an equitable interest in the funds held by the Corps, the estate holds only bare legal title with respect to that portion. Property to which the estate holds only bare legal title is not viewed as that which is available for satisfaction of claims of its general creditors." (April 3, 1991 Decision at pgs. 8 and 9).

Thus, this Court concludes that cause existed pursuant to §362(d)(1) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") to lift the stay and allow Northland to proceed with another forum.

In reality, the Debtor did not oppose Northland's motion in the sense that it contested Northland's equitable claim to the funds held by the Corp, it merely disputed the amount of Northland's claim.

The real party in interest, the IRS, opposed Northland's motion on the ground that Northland's exclusive remedy was pursuant to the Miller Act (40 U.S.C. §270 a and b) and that its remedy could be sought only against the payment bond. The IRS correctly perceived the controlling issue to be whether or not Northland had an equitable claim to a "trust fund" being held by the Corps. (See Supplemental Memorandum in Opposition to Motion to Obtain Relief from Automatic Stay dated March 14, 1991 at pg. 4).

The factual background against which the Second Circuit embraced the so-called

"Curtis factors" in In re Sonnax, Inc., supra, 907 F.2d 1280, was clearly dissimilar to the facts herein. In re Curtis, 40 B.R. 705 (Bankr. D.Utah 1984) likewise bears no factual similarity to the instant contested matter.

This Court does not believe that the Second Circuit intended that the "Curtis factors" were to be applied to every contested matter wherein a creditor seeks to lift the automatic stay of Code §362(a) for cause, pursuant to code §362(d)(1).

Obviously, the "Curtis factors" would not apply where the basis of the Code §362(d)(1) motion was: a) lack of adequate protection; b) a bad faith filing by debtor; c) a failure of debtor to file a plan and disclosure statement in a reorganization case; d) a contention that the property against which the movant sought to proceed was not property of the debtor's estate; e) that state law is preemptive such as in the are of domestic relations. Yet each of the foregoing might constitute "cause" for lifting the stay pursuant to Code §362(d)(1). See In re Sonnax, supra 907 F.2d 1285-86.

In fact, the Second Circuit observed that the "Curtis factors" were "to be weighed in deciding whether litigation should be permitted to continue in another forum." Id. at page 1286.

In such a case, the bankruptcy court is said to have broad discretion and in the Second Circuit that discretion is to be exercised within the framework of the "Curtis factors".

Here, the Court lifted that stay to permit Northland to establish (if possible\_ its equitable rights in a fund to which the Debtor's estate holds only bare legal title pursuant to Code §541(d). Thereafter, Northland commenced that action in the District Court.

There is no central concern here as there was in Sonnax and Curtis that the continuation of an actin in another forum would adversely impact on Debtor's ability to reorganize.

In Sonnax, supra, 907 F.2d 1286, two of the four Curtis factors considered by the

Circuit Court dealt directly with the impact that the continuation of the state court action would have on the debtor's ability to reorganize.

Here, such a concern was, at best, wholly ancillary to the property of the estate issue and was referenced by this Court at only the conclusion of the opinion.

This Court has, however, been directed on remand to consider the Curtis factors and it will do so.

The first of the Curtis factors requires consideration of whether relief would result in a partial or complete resolution of the issues, Here, Northland's action in the District Court will finally resolve its equitable claim to the funds held by the Corps.

The second factor requires a determination that the action pending in the other forum lacks any connection with or interference with the bankruptcy case. Here, since this Court has concluded that the funds held by the Corps are funds to which the Debtor holds only bare legal title, the District Court action subsequently commenced is neither connection with nor interferes with the bankruptcy case.

The third Curtis factor is inapplicable since the Debtor here is not a fiduciary vis a vis the funds held by the Corps, however, the Debtor's interest in that fund may exist to an even lesser degree than were it a fiduciary.

The fourth Curtis factor is likewise of no applicability here.

the fifth Curtis factor is indirectly applicable here. The existence of insurance in favor of a debtor generally prevents the enforcement of a third party's claim against assets of the debtor estate, and thus, a bankruptcy court in considering a motion to lift stay for cause will be more likely to vacate the stay to allow the third party's claim to be litigated in another forum since any judgment entered there which may be adverse to the debtor will not be satisfied from general assets

of the estate, but rather from insurance proceeds.

Such a concern is not present here, however, it is clear that any recovery Northland may obtain in another forum will be limited to the funds held by the Corps and not from property of the Debtor's estate.

The sixth Curtis factor would dictate in favor of lifting the stay where the dispute involves primarily third parties. Clearly, the dispute here involves only third parties, to wit: Northland and the IRS. To that end, the IRS would have the Court believe that it has already successfully defended Northland's action in the District Court and it has been determined that Northland has no right to the funds held by the Corps. If that were true, the IRS's posture with regard to both the sixth and seventh Curtis factors would dictate a denial of the motion to lift stay, since clearly all creditors of the Debtor would be interested in the funds held by the Corps and presumably turned over to the Debtor in excess of the amount of the IRS was able to successfully set off its claim against.

It is clear, however, that the District court has made no such determination at this juncture, and until it does, this Court's April 3, 1991 Decision with regard to the nature of the funds held by the Corps as being unavailable for general creditors, is the law of the case.

The eighth Curtis factor likewise would dictate in favor of lifting the stay, since there is no allegation here that Northland's claim to the funds held by the Corps is somehow subject to equitable subordination to the claims of other creditors pursuant to Code §510.

The ninth Curtis factor, again inapplicable in that what Northland seeks in its District Court action is to establish an equitable claim to the funds in the hands of the Corps. While it is true that Debtor is a party defendant in that action, it is not apparent that any judgment will be entered against the Debtor that would constitute a judicial lien avoidable pursuant to Code §522(F) and thus,

to continue the state on the basis of such a prospect is not warranted.

With regard to the tenth Curtis factor, the IRS would again have all concerned believe that Northland's suit in the District Court has been frivolously instituted and, therefore, judicial economy has been impaired by this Court's allowing it to be instituted. Having concluded that Debtor holds but bare legal title to the funds, this Court would conclude that the dispute is essentially between non-debtors, to be adjudicated in a court of general jurisdiction, with no need for any further proceedings in this Court, except in the event that Northland were to fail in the District court litigation.

In considering the eleventh Curtis factor, while it is apparent that the District Court action is not ready for trial, the promptness with which Northland instituted that action following this Court's April 3, 1991 Decision is evidence that it does not intend to procrastinate and thus, the Court believes that such conduct on Northland's part supports relief from the stay.

Finally, this Court concluded in its April 3, 1991 Decision that "the balance of hardships weighs in favor of lifting the stay to allow Northland to proceed in the appropriate (sic) forum", thus, satisfying the twelfth and final Curtis factor. (See April 3, 1991 Decision at pg. 10.).

On remand, the District Court has directed that upon a finding of "cause", that the Debtor demonstrate that it is entitled to continued protection of the stay.

It is clear, however, that while the Debtor has facially opposed the lifting of the stay, its opposition is grounded primarily in its dispute as to the amount due Northland, as well as its character as joint venturer rather than a sub-contractor. Both issues can and should be fully litigated before the District Court.

Having reconsidered the motion on remand in accordance with the direction of the District Court, this Court once again must reach the conclusion that Northland's motion should be

granted and the civil action presently pending before the District Court be allowed to proceed.

IT IS SO ORDERED.

Dated at Utica, New York

this    day of December, 1991

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STEPHEN D. GERLING  
U.S. Bankruptcy Judge